edge and that the possession of the drug by the applicant was not accidental.

A Singapore case, *Poh Soh Har & Anor* v *PP*[1] dealt with somewhat similar type of evidence. But we would like to express the following caution when referring to that case. First, the definition of 'trafficking' under s 2 of the Singapore Misuse of Drugs Act 1973 is differently worded from the definition of 'trafficking' in our Act. Section 2 of the Singapore Act deals with specific activities and the word 'means' in the definition there certainly restricts the scope of the definition. The definition of 'trafficking' in our Act is very wide and the definition begins with the words 'trafficking includes'. See also *Teh Geok Hock* v *PP*[2] at p 163 on the definition of 'trafficking' . Secondly, the Singapore Act (referred to in *Poh Soh Har*[1]) provided that any person proved to have had in his possession more than the statutory amount of the drug shall, until the contrary is proved, be presumed not to be 'trafficking' but to have had such drug in his possession 'for the purpose of trafficking' therein.

In this case the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possesion is not accidental.

Accordingly the answer to the question posed must be in the affirmative.

Order accordingly.

Solicitors: *K Chandra & Co*

Reported by *Prof Ahmad Ibrahim*

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 520 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND AJAIB SINGH SCJJ
11 OCTOBER 1990

Contract — Hire -purchase — Whether property passed

Evidence — No reasons given why persons not called to give evidence — Presumption that evidence not favourable — Evidence Act 1950, s 114(g)

In this case the appellants were the sole agents and distributors of two heavy machines. The respondents claimed that they had purchased the machines from Uni-East as dealers and they had hired the machines to Zarad. The machines were registered in the name of Zarad with the ownership claim endorsed for the respondents in the log books of the vehicles. The appellants had refused to release the machines to the respondents claiming that they had not been paid and therefore had an unpaid seller's lien. The respondents had claimed for the return of the two machines or their value. The defence of the appellants was that Uni-East was not acting as their agents and had no authority to represent themselves as agents. They counterclaimed for general damages for conversion. The learned trial judge allowed the claim of the respondents and dismissed the counterclaim of the appellants. He also held that certain persons had not been called to give evidence for the appellants and no reason had been given for the failure to do so. He invoked s 114(g) of the Evidence Act 1950 against the appellants. The appellants appealed.

Held, dismissing the appeal:

(1) The surrounding circumstances of the case clearly indicate that the property was intended to pass at the time of contract between the respondents and Zarad. It was not disputed that Zarad wanted to raise finance from the respondents on hire-purchase. The relevant documents were handed for that reason and to obtain registration.

(2) The learned trial judge was quite correct in the circumstances to invoke s 114(g) of the Evidence Act 1950 against the appellants.

[Bahasa Malaysia summary

Di dalam kes ini perayu adalah ejen tunggal dan pengedar dua mesin berat. Responden mendakwa mereka telah membeli mesin itu dari Uni-East sebagai peniaganya dan mereka telah menyewa mesin itu kepada Zarad. Mesin itu telah didaftar atas nama Zarad dengan catatan dibuat menunjukkan tuntutan kepunyaan oleh responden di dalam buku daftar mesin itu. Perayu telah enggan melepaskan mesin itu kepada responden dan mereka mendakwa mereka belum dibayar harganya dan mereka mempunyai lien penjual yang belum dibayar. Responden memohon pengembalian mesin itu atau nilainya. Pembelaan perayu ialah Uni-East tidak bertindak sebagai ejen mereka dan tidak berhak mengatakan mereka menjadi ejen. Mereka menuntut balas gantirugi umum untuk salah guna. Hakim yang arif telah membenarkan tuntutan responden dan menolak tuntutan balas perayu. Beliau juga berpendapat beberapa orang yang penting telah tidak dipanggil memberi keterangan mereka bagi pihak perayu dan tiada sebab diberi untuk kegagalan ini. Beliau menggunakan s 114(g) Akta Keterangan 1950 terhadap perayu. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Keadaan sekitar kes ini menunjukkan bahawa hak milik telah diniatkan berpindah pada masa kontrak itu antara responden dan Zarad. Tidak dinafikan bahawa Zarad ingin mendapati bantuan kewangan daripada responden melalui sewa beli. Dokumen yang berkaitan telah diserahkan untuk maksud itu dan untuk pendaftaran.

(2) Hakim yang arif yang membicarakan kes itu tidak silap di dalam keadaan kes ini menggunakan s 114(g) Akta Keterangan 1950 terhadap perayu.]

Legislation referred to
Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No C1139 of 1980 (High Court, Kuala Lumpur)

Matthias Chang for the appellants.
RR Sethu for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The claim of the respondents/plaintiffs in the court below arose out of a transaction involving two heavy machines being one Kawasaki Super Shovel (engine no 506431, serial no KLB 80-3325, model KS80) and Ursus Peroni Motor Grader (model UP 120/A, engine no 6004323, serial no 006385) bearing registration no WU 3566 and WU 3564 respectively. According to the statement of claim the appellants/defendants were the sole agents and distributors of these two vehicles and this was in fact admitted in para 2 of the statement of defence.

The transaction was a simple hire-purchase transaction between a company called Zarad Construction Sdn Bhd ('Zarad') and the respondents. There was default under the hire-purchase agreement (exh P15). Behind the scene was however another agreement between the respondents and another leasing company called Colossal High Leasing Sdn Bhd ('Colossal') which was a back to back arrangement whereby if Zarad defaulted Colossal had to indemnify the respondents to the full extent of the losses. Although counsel for the appellants urged us to place importance on this arrangement (between the respondents and Colossal) we do not think it is really relevant for the purpose of determining the appeal since we agree with the finding of the learned judge Colossal was never the real vendor of the machines but only an introducer of clientele.

Pursuant to the hire-purchase agreement, the machines were delivered to the appellants on 6 October 1980 which delivery was acknowledged. The appellants however refused to release the machines to the respondents claiming that they had not been paid and therefore had an unpaid seller's lien. Thus the action in the High Court.

Although the background of the transaction was made complicated by the presence of other companies who are not parties to the suit, namely, Colossal, Zarad and Uni-East Malaysia Sdn Bhd ('Uni-East') and Zamani & Co, the issue to be decided by the learned judge was only the actual legal relationship between the appellants and the respondents. The respondents as plaintiffs were suing for the return of the said two machines or their value to be assessed and damages. It was agreed apparently that the value of the machines be set at $400,000 which was accepted by the learned judge.

The claim of the respondents as stated in the statement of claim was simple. They had purchased the machines from Uni-East as dealers and the plaintiffs had hired the said machines to Zarad. The said machines were registered in the name of Zarad with the ownership claim endorsed for the plaintiffs in the log books of the vehicles.

At the hearing before the learned judge an official from the RIMV Wilayah Persekutuan (PW1) produced the records of the machines WU 3564 and WU 3566. It was shown they were new vehicles registered in the name of Zarad with ownership claimed by the respondents. The documents produced by the official were: exh P1A/P2A — customs forms no 1; exh P1B/P2B — photocopies of form 9; exh P1C/P2C — forms MVI; exh P1D/P2D — notifications of hire-purchase; exh P1E/P2E — letters from Guthrie requesting registration.

It is clear from the documents that the distributors of the machines were the appellants, Guthrie Sdn Bhd as the appellants were known then, who imported the vehicles. Documents P1A/P2A to P1E/P2E are the usual documents required from the distributor before vehicles are registered.

Before the learned trial judge two other witnesses were called on behalf of the plaintiffs. They were PW2, manager of the respondent company at the material time and PW3, the managing director of Colossal. PW3 was called to confirm the undertaking by Colossal to make good to the respondent any default in the payments under the hire-purchase agreement. Beyond noting this we do not think it would be the concern of this court to establish anything else because Colossal is not party to the suit. Whatever arrangement between Colossal and the respondents is entirely left to them.

On behalf of the appellants only the divisional manager of Mulpha Engineering gave evidence. At the material time DW1 was a sales executive of the appellants.

From the custody of the respondents and Colossal the following documents were produced to the court:

(1) A dealers master agreement between TML and Colossal dated 4 February 1980 (exh P3).
(2) A proposal form from Zarad and Colossal to TML to purchase each vehicle dated 9 February 1980 (exhs P9, P10).
(3) Invoices dated 8 February 1980 from Uni-East for each vehicle (exhs P11, P12).
(4) The original registration books for each vehicle with ownership claim by TML endorsed thereon on 6 February 1980 (exhs P13, P14).
(5) The HP agreements each dated 9 February 1980 executed by Zarad and TML (exhs P15, P16).
(6) Two delivery receipts executed by Zarad acknowledging it had taken physical delivery of the goods dated 9 February 1980 (exhs P17 and P18).

The learned judge came to what he called 'irrefutable conclusion' arising from these documents that possession of these documents enables a person not only to

have Zarad as the registered owner of the two machines but also to have the claim of ownership by the respondents endorsed on 6 February 1980. By 9 February 1980 the registration books of the two vehicles were already delivered to the respondents in exchange for the payment of $400,000 on the invoices of Uni-East and Zarad now assumed the responsibility as hirers to pay off the instalments under the hire-purchase agreement.

In the statement of defence the appellants denied that Uni-East was acting as their agents and that the dealers had neither authority nor consent to represent themselves as agents or otherwise of the appellants. Finally it was alleged in the statement of defence that any transfer of ownership if at all was effected unlawfully and was made fraudulently by the respondents or the dealers. The appellants also counterclaimed for general damages for conversion.

It must be appreciated in this case that the learned trial judge had only the evidence adduced on behalf of the respondents and documents which speak for themselves. DW1 had no personal knowledge of what went on in respect of the transaction involving the two machines. It was not disputed that an important official of the appellants involved in the transactions was in fact one Bart Chew who signed the documents P1E and P2E. DW1 also stated that Mr Mah Kim, the financial controller of the appellant company, must also sign the certificate but Mr Mah Kim was not called to give evidence. Another person who should also have first hand knowledge of the transaction was one Mr Lazar Fredericks who was the credit controller of the appellant company at the material time. Mr Lazar Fredericks' duty was to monitor the payments and to chase customers for money in respect of equipment sold by the appellants. He was also not called to give evidence.

No reasons were given why all these persons were not called to give evidence. The learned trial judge invoked s 114(g) of the Evidence Act 1950 against the appellants and we think he was quite correct under the circumstances to do so.

No evidence was adduced by the appellants in the court below to show that the documents tendered were forgeries. Indeed all these documents went into the agreed bundle of documents and no objection was raised at any stage of the proceeding.

The learned judge allowed the claim and dismissed the counterclaim. The surrounding circumstances of this case clearly indicate that the property was intended to pass at time of contract between the respondents and Zarad. It was not disputed that one Zamani (director of Zarad) wanted to raise finance from the respondents on hire-purchase. The documents referred to were handed by Zamani for that reason and to obtain registration. The fact that the documents passed through Uni-East to Colossal to respondents is immaterial.

The appeal is accordingly dismissed with costs. Deposit to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Suhaimi Khor Zulkifli & Chang; Khoo & Sidhu.*

Reported by *Prof Ahmad Ibrahim*

Khairul Anuar bin Abu Bakar (An Infant) v Lim Eng Choon

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 149 OF 1984
KC VOHRAH J
23 SEPTEMBER 1990

Tort — Negligence — Road accident — Liability — Failure to anticipate that children's playing could result in accident —Whether additional care should be taken in presence of children

Road Traffic — Negligence — Collision between cyclist and motor cyclist — Liability for damages

Damages (Personal Injury or Death) — Road accident — Injuries to head, face and brain — Impaired sense of smell, slight facial weakness, weakness in hand — Impairment of higher mental faculties — Paralysis of muscle in eye — Epilepsy — General damages — Multiplicand for loss of earning capacity

The infant plaintiff, then aged 12 years, was injured in a road accident when his bicycle collided with the defendant's motor cycle. He claimed damages for personal injuries sustained in the accident. The defendant denied all liability for the accident, claiming that the infant plaintiff had fallen across his path as a result of being pushed. Special damages of $450 were agreed as well as a multiplier of 24. The court was left to deal with the issue of liability, general damages, and the multiplicand for loss of earning capacity.

Held, finding both parties equally liable:

(1) On the evidence, the court had doubts about the infant plaintiff's version of the accident because of inconsistencies in the testimony and in his memory of the events leading to and of the accident. He was hesitant and equivocal in his answers to questions and his demeanour implied that he was not telling the truth.

(2) The defendant's version of the accident was to be believed, but as he had earlier seen the children and that they were pushing at each other, he should have anticipated that they would resume playing as he was overtaking them and that one or both of them could lose balance and fall across his path. He should have given a wider berth to them. The plaintiff had not taken reasonable care of himself. He had failed to appreciate a simple and basic rule of prudence that it was a rash and negligent thing to play on a road which was open to all sundry traffic while cycling. Thus both parties were equally liable for the accident.